THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

***+ Writ Petition No.* 6568 of 2006**

% Dated 26.03.2007

Gunaganti Bala Krishnamma.

....Petitioner

$ K.Aadi Seshaiah and another.

....Respondents

! Counsel for the petitioner : Sri P.Venugopala Rao
^ Counsel for respondent No.1 : Sri Madhava Reddy
^ Counsel for respondent No.2 : None appeared

< GIST:

> HEAD NOTE:

? Cases referred:

THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

WRIT PETITION No.6568 of 2006

Date: 26.03.2007

Between:

Guanaganti Bala Krishnamma.

....Petitioner

And

K.Aadi Seshaiah and another.

....Respondents

THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

WRIT PETITION No.6568 of 2006

O R D E R:

The first respondent filed O.S.No.420 of 2003 in the Court of Junior Civil Judge, Miryalaguda, against the petitioner, for recovery of certain amount, on the basis of mortgage. The suit was decreed *ex parte* on 10.02.2004. Thereafter, the first respondent filed I.A.No.566 of 2004 for final decree. It was allowed and E.P. was filed, to enforce the decree. The house of the petitioner was attached and it was sold in an auction

conducted by the Court. The petitioner states that she came to know about all these proceedings, only at a time, when the delivery of possession of the property was to be effected.

The petitioner filed an application under Order IX Rule 13 C.P.C., to set aside the *ex parte* decree, together with I.A.No.764 of 2006, under Section 5 of the Limitation Act, to condone the delay. She also filed E.A.No.77 of 2006 for stay of further proceedings in the E.P. The executing Court ordered notice in the E.A. Since the sale of the property was being proceeded with, the petitioner filed C.R.P.No.2015 of 2006 before this Court. Interim stay was granted, on condition that the petitioner deposits a sum of Rs.20,000/-. After hearing the parties, the C.R.P. was disposed of, on 11.07.2006, directing that the petitioner shall deposit a further sum of Rs.10,000/- and the first respondent shall be entitled to withdraw the total amount of Rs.30,000/-. The trial Court was directed to dispose of I.A.No.764 of 2006.

The trial Court took up the I.A. for adjudication. The petitioner stated that she did not receive summons in the suit and the failure to contest the matter by her, was on account of non-receipt of summons in the suit or in the E.P. The first respondent opposed the application. Through its order, dated 08.12.2006, the trial Court dismissed I.A.No.764 of 2006. Hence, this Civil Revision Petition.

Sri P.Venugopala Rao, the learned counsel for the petitioner submits that his client took the specific plea before the trial Court that she was not served with any summons in the suit or in the E.P., and the record also clearly disclosed that thumb

impression was said to have been obtained in the suit summons, whereas the petitioner is able to write and is not a thumb impressionist. He contends that the trial Court did not record any finding, to the effect that the summons were served upon the petitioner and despite the same, it refused to condone the delay.

Sri Madhava Reddy, the learned counsel for the first respondent submits that the bailiff of the Court submitted report, to the effect that the summons in the suit were served and the petitioner did not care to defend herself in the suit or in the E.P. Learned counsel points out that a strong explanation was needed for condonation of the delay, which was more than two years, and that no exception can be taken to the order of the trial Court.

Though the second respondent is served with notice, he has not chosen to enter appearance.

The facts, that gave raise for filing of the Civil Revision Petition, have already been stated in the preceding paragraphs, within the permissible limits of brevity. The petitioner moved the Court at a time, when the *ex parte* preliminary decree had become final, the mortgaged property was sold in a Court auction and the possession thereof was about to be delivered. This process took about two years and the petitioner approached the Court almost at the final stage of the proceedings. Valid and cogent explanation is needed to scuttle the proceedings at that stage.

The petitioner categorically stated that basically, she is a

native of Mahaboobnagar District. She was residing at Miryalaguda, for her livelihood; and on account of her serious illness, at the relevant point of time, she went to her native place for treatment. She stated that as soon as she came to came to know about the decree and execution proceedings, she has taken immediate steps and there was no delay in approaching the Court.

The first respondent filed a counter affidavit, denying the allegations. During the course of arguments in the I.A., it was specifically pointed out that the petitioner did not receive summons in the suit. The trial Court examined the record and noticed that thumb impression was obtained in the suit summons. The petitioner is not a thumb impressionist and she puts her signatures in writing. Except stating that the petitioner had allowed the period of limitation to expire, the trial Court did not record any finding as to whether the contention of the petitioner, as to service of notice, is correct or not.

The trial Court had undertaken extensive discussion and had proceeded to state the principles that govern the disposal of applications filed under section 5 of the Limitation Act. From a perusal of the order, particularly para (7) thereof, it is evident that the trial Court proceeded on the basis that the discretion of the Court, while dealing with an application filed under Section 5 of the Limitation Act, is almost unlimited and even if sufficient cause is shown, the Court can refuse to condone the delay. The approach of the trial Court can be culled out from the following observations.

> *"The fundamental rule, which has been universally accepted as rule-guiding Courts' discretion in this respect is to see whether the party claiming indulgence has been reasonably diligent in prosecuting his application, and that he has acted in a bonafide manner. Even after sufficient cause has been shown, a party is not entitled to the condonation of delay in question as a matter of right."*

While there cannot be any second opinion, about what is expressed in the first sentence, the view expressed in the second sentence, cannot be accepted at all. If sufficient cause is shown, the Court has to condone the delay. Otherwise, the very purpose of conferring power under Section 5 of the Limitation Act would become nugatory. Discretion of the Court, if at all, is mostly about recording the satisfaction. Once the Court is satisfied about the explanation offered by the party, it cannot refuse to condone the delay.

The averments of the petitioner that she migrated to her native place to undergo treatment, remained unrebutted. The interests of the first respondent have already been protected, while disposing of C.R.P.No.2015 of 2006 on 11.07.2006. The petitioner deserves to be given an opportunity of contesting the suit. The hardship, if any, suffered by the second respondent, on account of the delay being condoned and sale being set aside, cannot override the interests of the petitioner. He can be compensated by directing that the petitioner shall pay a sum of Rs.3,000/- towards costs.

For the foregoing reasons, the Civil Revision Petition is allowed, on condition that the petitioner deposits a sum of

Rs.3,000/- (Rupees Three Thousand Only) towards costs, within a period of four (4) weeks from today. On such deposit, the second respondent shall be entitled to withdraw the same. To avoid further complications in the matter, it is directed that the *ex parte* decree and the consequential sale shall stand set aside. The petitioner shall submit her written statement, within four (4) weeks from the date, on which the amount of costs, as directed, is deposited. In case, the conditions are complied with, the trial Court shall proceed to decide the suit on merits, and dispose it of as early as possible. There shall be no order as to costs.

26.03.2007

Note: L.R.Copy to be marked.

(B/o)

JSU